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U. S. COURT

No. 339

FILED

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1959**

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**NEW HAMPSHIRE FIRE INSURANCE COMPANY,  
PETITIONER**

*v.*

**THOMAS E. SCANLON, District Director of Internal  
Revenue, CITY OF NEW YORK and ACME CASSA,  
INC.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

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**BRIEF FOR THE DISTRICT DIRECTOR IN  
OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the District Court (R. 14a-16a) is reported at 172 F. Supp. 392. The *per curiam* opinion of the Court of Appeals (R. 17a) is reported at 267 F. 2d 941.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on June 22, 1959. (R. 17a.) The petition for a writ

of certiorari was filed on August 22, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

### QUESTION PRESENTED

Whether the courts below were correct in holding that a third party claiming a lien upon a taxpayer's property superior to the tax lien of the United States has a right to the determination of the conflicting claims in a plenary civil suit, but not by summary proceedings.

### STATUTE INVOLVED

28 U. S. C.:

SEC. 2463. *Property taken under revenue law not repleviable.*

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

### STATEMENT

The petitioner here is a surety company which furnished a performance bond on June 21, 1956, to the City of New York on behalf of the taxpayer-contractor, Acme Cassa. (R. 5a.) On March 4, 1959, the petitioner filed a petition in the United States District Court for the Southern District of New York for a summary determination of its claim to funds due the contractor in the hands of the City of New York as against tax liens of the United States. (R. 1a.) The petitioner's lien rests upon

the allegation that Acme Cassa, because of financial difficulties, became unable to complete the work required to be performed by it, and demand was made upon the petitioner, as surety, to complete the work and to pay various unpaid suppliers of labor and material for work and material supplied by them in connection with the prosecution of the work required to be performed. (R. 6a.) As of November 25, 1958, the petitioner alleged that in accordance with this demand it had paid to such suppliers of labor and material the sum of \$82,990.17. (R. 7a.) Prior to that date and in the period from November 1, 1957, through May 21, 1958, the petition stated on information and belief that four separate notices of lien and levy for various federal taxes totalling \$62,266.37, claimed to be due from Acme Cassa, were filed by the District Director of Internal Revenue in the appropriate office of the City of New York; and "various sums" had been paid on the levy leaving an unpaid balance due of "approximately \$35,000" and the District Director had reduced the tax lien to that amount. (R. 6a-8a.) The petition further alleged that but for the notices of lien and levy the City treasurer is ready to pay over to the petitioner all funds due to the taxpayer from the City. (R. 7a-8a.) On these allegations, the petitioner prayed that the notices of levy be quashed or in the alternative that the amounts due to the United States be determined and the petitioner paid any excess in the hands of the City. (R. 8a-9a.)

On March 4, 1959, the date of the filing of this petition, the District Judge issued an order directing



service of the petition on or before March 25, 1959, and requiring the District Director to show cause on March 31, 1959, at Motion Term, why the relief prayed for should not be granted. (R. 2a-3a.) On April 16, 1959, the Government filed an affidavit in opposition to the petition to quash the notices of levy on the ground that no civil action had been instituted either by the United States or the petitioner with respect to their claims to the property. (R. 1a, 11a-12a.) On the same day, the District Court dismissed the summary proceedings to quash the notices of levy and remitted the petitioner to a plenary suit for an adjudication of the conflicting claims between it and the United States to the taxpayer's property. (R. 14a-16a.) The decision was affirmed in a *per curiam* opinion by the Court of Appeals. (R. 17a.)

#### ARGUMENT

The decision below is correct and no substantial question requiring review by this Court is presented. The question presented is a narrow one, *i.e.*, whether a person claiming a lien upon a taxpayer's property, superior to the tax lien of the United States, may compel the United States to adjudicate the validity of the liens in summary proceedings rather than in a plenary suit, in accordance with the Federal Rules of Civil Procedure, brought by either the claimant or the United States. The United States may bring suit in a Federal District Court to adjudicate the validity of its lien under Section 7402 of the Internal Revenue Code of 1954, and a person claiming a lien upon property superior to the tax lien may bring

suit in a state or federal court of competent jurisdiction to quiet his title or foreclose his lien under 28 U. S. C., Section 2410. *Seattle Assn. of Credit Men v. United States*, 240 F. 2d 906 (C. A. 9th); *United States v. Stock Yards Bank of Louisville*, 231 F. 2d 628 (C. A. 6th). There is no express statutory authority for summary proceedings and none can be implied from 28 U. S. C., Section 2463, *supra*, p. 2, which prohibits summary proceedings by way of a writ of replevin, and affords a jurisdictional basis for otherwise allowable suits. *Seattle Assn. of Credit Men v. United States*, *supra*. See *In re Fassett*, 142 U. S. 479. Whatever authority for summary relief may be provided by the general equity powers of a District Court (cf. *Holland v. Nix*, 214 F. 2d 317 (C. A. 5th)), there is no right to summary relief where relief in an orderly fashion by civil suit is available. *Goldman v. American Dealers Service*, 135 F. 2d 398 (C. A. 2); *In re Behrens*, 39 F. 2d 561 (C. A. 2d); *Fine Fashions, Inc. v. Moe*, 172 F. Supp. 547 (S. D. N. Y.); *Winokur v. A'Hearn*, 172 F. Supp. 498 (S. D. N. Y.). The only justification offered by the petitioner in support of its claim to summary procedure, rather than an ordinary civil action, is that since the property is in the jurisdiction of the court, a claimant thereto should not be put to "time consuming and expensive processes of a plenary suit at law". (Pet. 6.) But if the taxpayer is correct in its contention that there are no genuine issues of fact in the case (cf. Pet. 3), it may secure prompt and inexpensive relief in an ordinary civil suit by a motion for summary judgment, which may be filed

twenty days after the service of its complaint. Federal Rules of Civil Procedure, Rule 56. There is no reason why the United States should be forced into a compulsory summary procedure, where there may well be issues of fact concerning the "details \* \* \* of controlling importance" as to the time and circumstances out of which the respective liens arose. *In re Behrens, supra*, 39 F. 2d at 563.

The alleged conflict between the decisions of the Second Circuit (*In re Behrens, supra*; *Goldman v. American Dealers Service, supra*), and the Third Circuit (*Raffaele v. Granger*, 196 F. 2d 620; *Rothensies v. Ullman*, 110 F. 2d 590) is more formal than real. No urgent questions of jurisdiction are in fact involved here since the decision below is placed not only on jurisdictional grounds, but also on the ground that a suit for summary relief "does not lie" (R. 15a) where relief by plenary suit is readily available (R. 15a). Moreover, both *Ullman* and *Raffaele* involved a claim that a petitioner's property was being taken to pay the taxes of another, and not, as here, asserted liens upon a taxpayer's property held by a stakeholder. In any event, the petitioner is not substantially affected by the decision below, since it may, without prejudice to its claimed right to the property involved, easily comply with it.



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**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1959.